Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

PETITION FOR WRIT OF CERTIORARI

Robert A. Levy
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29 pp

QUESTION PRESENTED

In a case dismissed because of the running of the statute of limitations, may a State tolling provision which is inapplicable on the given facts nevertheless prevent a litigant from relying upon the federal tolling provision 28 U.S.C. §1367(d), thereby nullifying the federal statute?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Swift Transportation Company (Phoenix, Arizona), Jerry C. Moyes, Keith Dale Nichols, and Eddie Lee Tiggs, were parties before the Court of Appeals.

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Petitioners, Robert A. Levy and Phyllis B. Levy, respectfully request that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New Mexico in this case.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals of New Mexico appears at Appendix A to this petition and is unpublished. The Judgment of the Third Judicial District Court of New Mexico in Levy v Swift et al., No. CV-99-90, dismissing plaintiffs' complaint appears at Appendix B of this petition and is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of the State of New Mexico ("Court of Appeals") was entered on November 15, 2001(App.A). The Supreme Court of New Mexico denied a timely petition for writ of certiorari on February 12, 2002 (App.D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The Supplemental Jurisdiction statute 28 U.S.C. §1367 provides in relevant part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other

claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under article III of the United states constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The New Mexico savings statute, NMSA 1978 §37-1-14 (1880) states as follows:

If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

STATEMENT OF THE CASE

The question in this Petition is whether or not a State tolling statute can be used to prevent the application of a federal tolling statute to petitioners' (the Levys) lawsuit, when the State statute is inapplicable to the facts of the case.

This case has had a lengthy and varied trip through the federal and state (New Mexico) judicial systems, including a prior Petition for Writ of Certiorari to this Court [99-1356, 529 U.S.1055 4/3/2000)]. Plaintiffs filed cause CIV-97-0777 (*"Levy I"*) in the United States District Court for the District of

New Mexico on June 6, 1997, alleging personal injuries and property damages arising out of an automobile accident that occurred in Grant County, New Mexico on July 20, 1994. *Levy I* was dismissed on April 28, 1998 for want of federal jurisdiction. Less than a month later, on May 15, 1998, Plaintiffs filed a second lawsuit in federal court, cause number CIV-98-578 ("*Levy II*"), which they amended on May 22, 1998, to include invocations of the federal and state savings statutes, 28 U.S.C. §1367(d) and NMSA §37-1-14 respectively. In motions to dismiss, defendants argued that the savings statutes were inapplicable and that the case was barred by the applicable statutes of limitations. *Levy II* was dismissed on December 30, 1998, without prejudice, on grounds that none of the federal claims were viable, as a result of which the federal courts lacked subject matter jurisdiction. After unsuccessfully moving under Rule 59 to amend the judgment, plaintiffs appealed unsuccessfully to the United States Court of Appeals for the Tenth Circuit, No. 99-2167, 194 F 3d 1320, and to the Supreme Court of the United States, 529 U.S.1055. The present lawsuit ("*Levy III*") was filed in the third judicial district court of New Mexico, number CV-99-90, on January 28, 1999, invoking the federal and State Savings statutes: "Plaintiffs claim jurisdiction of this Court over the instant action under 28 U.S.C. §1367(d), and as a continuation of the prior cases pursuant to NMSA 1978 §37-1-14"(R.P.2).[1] On joint motion for summary judgment, defendants argued that "§1367(d) does not apply if 'state law provides a longer tolling period.' As Plaintiffs admit, NMSA 1978 §37-1-14 provides a six-month tolling period, five months longer than §1367(d). Accordingly, the federal statute is inapplicable by its own terms"(R.P.624) The Levys argued

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[1]Citations to "R.P." refer to the Record Proper from the District Court.

that if the state provision were inapplicable, its tolling period would be zero days, thereby leaving the federal statute applicable, invoking the supremacy clause of the U.S. Constitution (R.P.697). Without discussion, Judge Robles dismissed *Levy III* on grounds that Plaintiffs' claims were time-barred (App.B).

The Levys appealed the summary judgment to the Court of Appeals. Their Docketing Statement included the following:

> "The following issues are presented by the Levys in this appeal: A. Whether the trial court erred by holding that the federal saving statute, 28 USC 1367(d), did not toll the statute of limitations during the pendency of *Levy I* and *Levy II*. This issue was raised in the Levys' complaint, in their answer to the motion for summary judgment, in their supplemental brief, and by reference in the motion for reconsideration."

The parties reiterated their arguments in the briefs on appeal, and on November 15, 2001, the Court of Appeals affirmed the summary judgment of the district court on grounds that "since the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, the federal statute does not by its own terms apply" (App.A at 5a), and also finding that the State savings statute was inapplicable (App.A at 7a).[2] The Levys' motion for rehearing in the Court of Appeals and petition for

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[2]In light of its disposition, the Court did not address the remainder of the parties' arguments (App. A at 8a).

writ of certiorari to the Supreme Court of New Mexico were denied, the latter on February 12, 2002.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER AND JUDGMENT OF THE NEW MEXICO COURT OF APPEALS NULLIFIES THE FEDERAL TOLLING STATUTE, 28 U.S.C. § 1367(d).

In 1990, the U.S. Congress enacted legislation establishing the Supplemental Jurisdiction statute, 28 U.S.C. §1367, which codified the doctrines of pendent, ancillary, and supplemental jurisdiction and gave federal courts jurisdiction over claims which they otherwise might not have had. Subsection (c) of this statute gave the federal courts discretion to decline supplemental jurisdiction over such claims in certain circumstances. In the event that a claim is declined pursuant to Subsection (c), Subsection (d) of this statute provides for tolling the statutes of limitations on the claim so that it will not be time barred when refiled:

"(d) The period of limitations.....shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period" (Emphasis supplied).

The issue here is the significance of the clause "unless State law provides for a longer tolling period." ("the duration clause"). The Levys believe this issue is a matter of first impression for this Court.

The simple grammatical sense of Subsection (d) is that a litigant has at least 30 days to refile, the exact time depending

on whether or not a State tolling statute provides more than 30 days. There is no indication that Congress intended any other construction. See Practice Commentary to 28 U.S.C. §1367 by David D. Siegel, Codifying "Supplemental" Jurisdiction.

In affirming the summary judgment in this case, the Court of Appeals construed the duration clause to mean something quite different, namely that States with savings statutes providing a tolling period of more than 30 days are exempt from application of federal provision § 1367(d), particularly when the State provision is inapplicable to the facts of the given case. **So that even when a plaintiff refiles his claims within the 30-day post dismissal period provided by§1367(d), it is the applicability of the state statute which determines whether or not the claims are time barred.**

When the Levys filed *Levy III* twenty-nine days after *Levy II* was dismissed, they invoked the New Mexico savings statute §37-1-14 and the federal tolling statute 28 U.S.C. §1367(d) to toll the applicable statutes of limitations. The Court of Appeals held that § 37-1-14 was inapplicable to benefit *Levy III* because *Levy II* had been filed in federal court instead of state court, such a mistake constituting negligence in prosecution, making §37-1-14 inapplicable (App. A at 7a).

The Court of Appeals also held that the federal tolling statute 28 U.S.C. §1367(d) was inapplicable: "Since the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, thefederal statute does not by its own terms apply" (App.A, at

5a).[3] Since both the federal and state savings statutes were inapplicable, *Levy III* was barred by the pertinent statutes of limitations because it was filed more than four years after the cause of action accrued, and the summary judgment of the district court was affirmed.

This holding by the court of appeals amounts to nullification of the federal tolling statute 28 U.S.C. §1367(d). Such nullification is a flagrant violation of the supremacy clause of the U.S. Constitution, Const. Art. VI, and must be reversed by this Court, *M'Culloch v. Maryland*, Md.1819, 17 U.S. 406, 4 Wheat. 406, 4 L.Ed.579. Otherwise, State governments will be able to control the application of federal law, in direct violation of a basic precept of the Constitution of the United States.

An example is the situation in the State of Georgia. There the state savings statute has a tolling period of six months, similar to New Mexico. However, in Georgia the case law has held that the savings statute does not apply to cases dismissed for lack of jurisdiction [See Lillibridge v. Riley, 316 F 2d 232,233 (Fifth Cir. 1963)] The federal tolling statute §1367(d)was enacted to cover just such cases, namely those

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[3]Before the appeal was briefed, the Court of Appeals issued a Calendar Notice of a proposed summary disposition, proposing to hold that §1367(d) **did apply** for the benefit of *Levy III*, and that "if defendants wish to argue [as they did in the district court] that § 1367(d) is inapplicable because state law provides a longer tolling period, Defendants should direct this Court to some authority for the proposition that a state tolling provision which is inapplicable on the given facts may nevertheless prevent a litigant from relying upon the federal tolling provision"(bracketed clause supplied). Defendants failed to produce any such authority in the briefs subsequently filed.

dismissed for lack of jurisdiction. But because the state statute has a longer tolling period and cases dismissed for lack of jurisdiction are not covered, the federal statute would thus be nullified in that jurisdiction, according to the Court of Appeals.

On the other hand, in the State of California the legislature has decided not to have a savings statute. There §1367(d) would apply without restriction. Thus, according to the Court of Appeals, §1367(d) would apply in States with no tolling statute but not in States with a tolling provision. By adopting a restrictive tolling statute, a State such as California could take away a right provided to its citizens by federal law.

The Court of Appeals' holding violates the principle that "Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different," *In re Goldsworthy's Estate*, 115 P 2d 627,631(N.Mex. 1941), quoting Sutherland on Statutory Construction.

The construction adopted by the Court of Appeals violates the doctrine of the "last antecedent", which says that "qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote," *Elliot Coal Min. v. Dir., Office of Wkrs. Comp*, 17 F 3d 616,629 (3rd Cir.1994).[4] The absence of a comma or other punctuation before the coordinate conjunction "unless" confirms that the

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[4]The last antecedent doctrine goes back a long way, *Wood v. Baldwin*, 10 NYS 195,196 (1890): "The rule of grammar, which is also a rule of law, is that a relative clause relates to the nearest antecedent that will make sense. The rule is as ancient as the language," citing cases as far back as Edward IV.

duration clause modifies only the phrase immediately preceding, *Elliot* at 630. Application of the "mischief rule", *Elliot* at 631, is further confirmation.

Reading §1367(d) in the light of the last antecedent rule, the duration clause "unless State law provides for a longer tolling period" applies only to the phrase "for a period of 30 days after it is dismissed" and not to the preceding language, thereby affecting the duration but not the existence of the tolling period.[5]

The duration clause is meant to give the litigant at least a 30-day period to refile, not to deny him that right in certain States, such as Georgia, or in this instance, New Mexico. It is an enlarging clause, not a restricting clause.

Therefore when a plaintiff refiles his claims within 30 days after dismissal, the applicable statutes of limitations are tolled by §1367(d), regardless of the existence or applicability of a state tolling provision.

Since *Levy III* was filed less than 30 days after *Levy II* was dismissed, §1367(d) should be applied for the benefit of the *Levy III* lawsuit, such that the limitations period was tolled during the pendency of *Levy II*. Therefore, the decision of the Court of Appeals should be reversed and the case remanded for further proceedings consistent with the findings of this Court.

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[5]Even assuming *arguendo* that the duration clause applies to the entire statute as held by the Court of Appeals, if as here the state tolling provision is inapplicable to the facts of the case, then the "State law" does not "provide for a longer tolling period;" it provides no tolling period whatsoever, and § 1367(d) thus applies anyway.

CONCLUSION

Simply put, the issue presented by this case--can a State nullify a federal statute, cannot be disregarded. Aside from the serious consequences to the Levys in being denied the ability to pursue their claims, the consequences for the relationship between the States and the federal government are too drastic to contemplate. By granting the Levys' petition for writ of certiorari, this Court can correct the Court of Appeals' ill-advised decision, which nullifies an important federal statute by means of faulty statutory construction.

Accordingly, the Levys respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A - JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW MEXICO FILED NOVEMBER 15, 2001

Appeal No. **21,501**
Dona Ana County **CV 99-90**

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs-Appellants,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Appellees

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY
Robert E. Robles, District Judge

MEMORANDUM OPINION

ARMIJO, Judge.

Plaintiffs appeal the district court's order granting summary judgment to Defendants on the grounds that Plaintiffs' action was barred by the applicable statute of limitations. Plaintiffs raise several arguments on appeal, contending that the district court erred in refusing to apply our federal and state saving statutes to bring Plaintiffs' claims within the applicable limitation periods. For the reasons that follow, we affirm the district court's decision to dismiss Plaintiffs' complaint.

BACKGROUND

This appeal arises from Plaintiffs' failed attempt to file a lawsuit in federal court to recover damages allegedly caused by an automobile accident, occurring on July 20, 1994. Almost three years after the accident, on June 6, 1997, Plaintiffs filed a complaint in federal court against the same parties named in this action, seeking to recover for personal injuries and property damages sustained in the accident. See Levy v. Swift Transp.Co., No. CIV97-0777HB/JHG (D.N.M. June6,1997)(Levy I). Plaintiffs subsequently moved to amend their federal complaint to add the Central Intelligence Agency (CIA) as a defendant, alleging that the CIA conspired with the other Defendants to kill or injure Plaintiffs by tracking and following Plaintiffs in their vehicle, which allegedly culminated in the automobile accident and further alleging that the CIA had been engaged in a continuing conspiracy against Plaintiffs since 1961. Defendants moved to dismiss Plaintiffs' federal complaint for lack of subject matter jurisdiction and the federal district court agreed that Plaintiffs' complaint should be dismissed for failure to establish diversity jurisdiction. The federal district court also denied Plaintiffs' motion to amend the complaint to add the CIA as a defendant as a futile attempt to establish federal jurisdiction because Plaintiffs' proposed claims against the CIA could not survive a motion to dismiss, or motion for summary judgment. Accordingly, the court dismissed Levy I without prejudice.

Less than one month after the dismissal of Levy I, Plaintiffs filed a second lawsuit in federal court. See Levy v. Swift Transp. Co., No. CIV 98-578 LH/WWD (D.N.M. May 22,1998)(Levy II). In its memorandum opinion and order ruling on motions to dismiss Levy II, the federal district court noted that the complaint filed in Levy II was "substantially the

same as the proposed complaint that [the court] refused to allow Plaintiffs to file in [Levy I]." After reviewing the claims in the Levy II complaint, the federal district court concluded that the claims against the CIA and United States should be dismissed. Without these defendants as parties to the lawsuit, the court further concluded that it lacked subject matter jurisdiction because Plaintiffs had again failed to establish diversity jurisdiction. The court therefore dismissed Levy II without prejudice. In addition to again dismissing Plaintiffs' complaint, the federal court sua sponte issued a memorandum opinion and order barring Plaintiffs from filing any further actions in that court against the same named defendants and relating to the same subject matter. The court described Plaintiffs' actions in Levy II as "an abuse of process," concluding that Plaintiffs had in effect engaged in frivolous and vexatious tactics intended to circumvent the court's ruling in Levy I by filing substantially the same disallowed complaint under a new docket number. Accordingly, the court in Levy II ruled that restrictions on Plaintiffs' right to file future pleadings in federal court were "warranted, given the frivolous and vexatious nature of [Plaintiffs'] pleadings...."

While Plaintiffs were unsuccessfully appealing Levy II to the United States Court of Appeals for the Tenth Circuit and the United States Supreme Court, Plaintiffs also filed a substantially similar complaint (absent the federal government defendants who Plaintiffs tried to sue in federal court) in New Mexico state district court on January 28, 1999, which is the subject of this appeal--Levy III. Defendants moved for summary judgment, arguing that Plaintiffs' claims were barred by the applicable statutes of limitation because Plaintiffs' personal injury claims were not initiated in state court within three years of the accident and because Plaintiffs' property damage claims were not initiated in state court within four years

of the accident. See NMSA 1978 §§ 37-1-8 (1976) (action for personal injury must be brought within three years of accrual of cause of action) and -4 (1880)(action for property damage must be brought within four years of accrual of cause of action). The court concluded that Plaintiffs' claims were barred by the pertinent statutes of limitation and granted Defendants' motion for summary judgment. Plaintiffs now appeal.

DISCUSSION

Although Plaintiffs did not file their complaint in state district court until more than four and one-half years after the automobile accident, Plaintiffs argue that the district court erred by granting summary judgment based on the three-year statute of limitations for personal injury claims and four-year statute of limitations for property damage claims. In particular, Plaintiffs contend that the court should have applied our state and federal savings statutes to toll the applicable statutes of limitation. See NMSA 1978 §37-1-14 (1880) (New Mexico Savings Statute); 28 U.S.C. 1367(d) (federal savings statute). Since Plaintiffs filed Levy I in federal court within three years of the automobile accident, Plaintiffs maintain that their personal injury and property damage claims were timely filed in state district court. We review the district court's decision to grant summary judgment de novo on appeal. See Hasse Contracting Co. v. KB Fin., Inc., 1999-NCSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Self v. United Parcel Serv., Inc., 1998-NCSC-046, ¶6, 126 N.M. 396, 970 P.2d 582.

Plaintiffs maintain that their claims are not barred by the applicable statute of limitations because the lawsuit is encompassed within the New Mexico Savings Statute. Since

the New Mexico savings statute provides a six-month period in which to sue, whereas the federal statute provides only thirty days, the federal statute does not by its own terms apply. Additionally, for the reasons that follow concerning jurisdiction, it did not appear that the federal court ever had jurisdiction. Thus, we concentrate on the state statute. Section 37-1-14 provides:

> If, after the commencement of an action, the plaintiff fail[s] therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

However, for the reasons that follow, we conclude that the New Mexico Savings Statute does not apply under the undisputed facts of this case.

As noted above, the complaint in Levy I was dismissed for lack of subject matter jurisdiction and Plaintiffs were not allowed to file a proposed amended complaint because the proposed amendment was a futile attempt to establish federal jurisdiction by joining the federal government as a defendant based on proposed claims that would not survive a motion to dismiss, or motion for summary judgment. Despite this clear ruling in Levy I, Plaintiffs persisted in filing substantially the same proposed amended complaint as a new original complaint under a new docket number in Levy II. The court in Levy II predictably dismissed the claims asserted against the federal government and dismissed the remaining claims against the non-governmental defendants for lack of subject matter jurisdiction. In so doing, the court in Levy II characterized

Plaintiffs' actions as "an abuse of process" and "frivolous and vexatious tactics" that warranted the prohibition of further federal court filings by Plaintiffs involving the same defendants and subject matter.

Under the express terms of Section 37-1-14, the New Mexico Savings Statute does not apply to a cause of action that fails because of "negligence in [its] prosecution." Plaintiffs suggest that negligence in prosecution only involves a failure to move a case along. However, in Barbeau v. Hoppenrath, 2001-NMCA-077, ¶ 12, Vol.40, No.44,SBB 19, this Court declined to limit "negligence in its prosecution" to cases in which the lawsuit is filed, but not prosecuted. Instead, we held that Section 37-1-14 "is intended to protect those who prosecute their action in a non-negligent manner; the plaintiff must choose a forum that arguably has the power to decide the matter involved." Id. ¶ 15. In Barbeau, the plaintiffs filed their first complaint in federal court shortly before the statute of limitations was about to expire. Id. ¶ 16. The complaint on its face defeated subject matter jurisdiction and later the plaintiffs also conceded in federal court that there was no personal jurisdiction. Id. ¶ 4. Based on those circumstances, we stated in Barbeau that the Plaintiffs "made no showing that the filing in Oregon federal court was an innocent mistake or an erroneous guess at an elusive jurisdictional fact known only to the defendants or any other circumstance that might serve to excuse what otherwise appears clearly to be negligence." Id. ¶16. Accordingly, we concluded that the New Mexico Savings Statute was inapplicable because there was negligence in prosecution as a matter of law. Id. ¶ 17. In light of our decision in Barbeau, we believe the same result is warranted in this case.

Even though Plaintiffs were plainly advised in Levy I that their complaint and proposed amended complaint failed to

establish subject matter jurisdiction, Plaintiffs inexplicably proceeded to file yet another substantially similar complaint in the same federal court. Indeed, because there was no reasonable explanation for Plaintiffs' actions, the federal court in Levy II prohibited Plaintiffs from filing similar pleadings in the future because of their "abuse of process" and "frivolous and vexatious tactics." See Barbeau, 2001-NMCA-077, ¶ 4 (noting that federal magistrate found that plaintiffs' counsel was not diligent in the case). In short, under the undisputed facts of this case, we find no basis for concluding that Plaintiffs' decision to pursue Levy II "was an innocent mistake or an erroneous guess at an elusive jurisdictional fact." nor have plaintiffs suggested any other circumstance to excuse what we believe was obvious negligence in the prosecution of Plaintiffs' claims against Defendants. Therefore, we hold that the New Mexico Savings Statute cannot be applied to toll the applicable statutes of limitations in this case.

Plaintiffs seem to suggest that they are still entitled to the protection of the New Mexico Savings Statute because even if there was negligence in the prosecution of Levy II, there has been no showing of negligence in the prosecution of Levy I. Even assuming that the New Mexico State Savings Statute could be applied to toll the running of the applicable statute of limitations from Levy I, the tolling period would only extend for a period of six months under the express terms of Section 37-1-14. However, Levy III was not filed until January 28, 1999, which was approximately eight months after Levy I was dismissed on April 28, 1998. Thus, even if Plaintiffs were given the benefit of the six-month tolling provision from the dismissal of Levy I, instead of Levy II, the six-month period would have nevertheless elapsed by the time Plaintiffs filed Levy III in state district court.

Because Levy II was dismissed without prejudice and the court stated that its "Memorandum Opinion and Order is on the merits, resolves all remaining issues and adjudicates all rights and liabilities of the parties," Plaintiffs believe that the court in Levy II necessarily determined that the state and federal savings statutes applied to Plaintiffs claims. Accordingly, Plaintiffs assert that under the doctrines of law of the case or collateral estoppel, the district court was precluded from concluding otherwise in this case. We disagree.

As noted above, in Levy II, the court dismissed the claims against the federal defendants and concluded that it lacked subject matter jurisdiction with regard to the remaining claims against the non-governmental defendants. The court's orders must be read within that context. Since the court concluded that it lacked subject matter jurisdiction to consider Plaintiffs' claims, it necessarily did not, and could not, rule on whether the federal and state savings statutes would permit Plaintiffs to pursue their claims in state court. The dismissal without prejudice in Levy II was nothing more than an acknowledgment that it lacked the jurisdiction to decide whether Plaintiffs' claims could be pursued in another jurisdiction. Despite Plaintiffs' arguments to the contrary, we find nothing in the court's orders in Levy II that can be reasonably construed as a ruling in favor of Plaintiffs on the issue of the applicability of the federal or state savings statutes.

CONCLUSION

Based on the foregoing, we affirm the district court's summary judgment order dismissing Plaintiffs' claims as barred by the applicable statutes of limitation. In light of our disposition, we need not address the remainder of the parties' arguments regarding why the federal and state saving statutes

should or should not operate to toll the statutes of limitations in this case.

IT IS SO ORDERED.

s/M.CHRISTINA ARMIJO, Judge

WE CONCUR: s/ **A. JOSEPH ALARID**, Judge

s/ **LYNN PICKARD**, Judge

APPENDIX B - JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF NEW MEXICO FILED MAY 30, 2000

No. **CV-99-90**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants.

SUMMARY JUDGMENT

THE MATTER of Defendants' Joint Motion for Summary Judgment having regularly come before the Court, the Court having reviewed the Motion and all memoranda submitted by the parties in support of and opposition thereto, and being otherwise well and fully advised in the premises, FINDS:

1. The Motion is well taken and should be granted.
2. This action is barred by the pertinent statutes of limitations.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this cause of action is hereby DISMISSED WITH PREJUDICE.

s/ **Robert E. Robles**, District Judge

APPENDIX C -ORDER DENYING REHEARING
COURT OF APPEALS OF NEW MEXICO
FILED DECEMBER 18, 2001

Appeal No. **21,501**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs-Appellants,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Appellees

A. JOSEPH ALARID, Presiding Judge
LYNN PICKARD, Judge
JAMES J. WECHSLER, Judge

ORDER ON MOTION FOR REHEARING

In this cause, a motion for rehearing having been filed by Plaintiffs-Appellants, and consideration having been had by two of the members of the original panel and by a third judge who has been designated by the chief judge pursuant to Rule 12-404(B) NMRA 2001,

IT IS ORDERED that the motion for rehearing is hereby **DENIED**.

s/ **A. Joseph Alarid**, Presiding Judge

APPENDIX D - ORDER DENYING CERTIORARI SUPREME COURT OF THE STATE OF NEW MEXICO
FILED FEBRUARY 12, 2002
NO. **27,290**

ROBERT A. LEVY and PHYLLIS B. LEVY,
Plaintiffs-Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY, et al.,
Defendants-Respondents.

ORDER

This matter coming on for consideration by the court upon petition for writ of certiorari, and the Court having considered said petition and responses, and being sufficiently advised, Chief Justice Patricio M. Serna, Justice Joseph F. Baca Justice Gene E. Franchini, Justice Pamela B. Minzner, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is **denied** in Court of Appeal number **21501.**

IT IS SO ORDERED.

WITNESS, The Hon. Patricio M. Serna, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 12th day of February, 2002.

s/Madeline Garcia, chief Deputy Clerk